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In the Supreme Court of the United States

OCTOBER TERM, 1979

JORGE LUIS VALDES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court and court of appeals erred in refusing to grant petitioner bail pending appeal on the ground that he posed a danger to the community.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-5a) is reported at 617 F. 2d 59. The oral opinion of the district court (Pet. App. 1a-2a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 1980. A motion for reconsideration (Pet. App. 6a) was denied on July 7, 1980. The petition for a writ of certiorari was filed on July 16, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Georgia, petitioner was convicted of conspiring to import marijuana, methaqualone, and cocaine, in violation of 21 U.S.C. 952, 960 and 963. He was sentenced to 15 years' imprisonment to be followed by a special parole term of 15 years, and fined $25,000.[1] The trial judge denied an application for bail pending appeal (Pet. App. 1a-2a). Petitioner thereupon moved for bail in the court of appeals, which likewise denied the motion (*id.* at 3a-5a).

1. Evidence at trial showed that between May 1978 and May 1979, petitioner and his co-defendants imported and attempted to import into the United States large quantities of controlled substances. During a flight across Central and South American in April 1979, petitioner, a co-conspirator and two pilots were compelled by engine trouble to land in Panama (Trial Tr. 4, 30). Panamanian officials found and seized suitcases containing ap-

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[1]Petitioner would appear to be entitled to have his special parole term vacated. See *Bifulco* v. *United States*, No. 79-5010 (June 16, 1980). He can pursue this relief in the district court pursuant to Rule 35, Fed. R. Crim. P.

proximately 233.2 pounds of 93.4% pure cocaine (Memorandum and Order Setting Bail, July 17, 1979, Exhibit A to Government's Motion for an Order Denying Bail Pending Appeal 1). The government's investigation showed that the drugs had cost more than $1.3 million (*ibid.*). Petitioner had discussed other drug dealings with his co-conspirators. He stated that he had two buyers in San Francisco to whom he had previously sold cocaine (Pet. App. 4a). He also said that he owned 20,000 pounds of marijuana in Colombia that he was planning to import (*ibid.*).

2. After imposition of sentence, the trial court denied petitioner's application for bail pending appeal (Pet. App. 1a-2a). The court noted that evidence of petitioner's background had already been adduced at several earlier bail hearings.[2] These hearings had revealed that petitioner, though only 24 years old, had acquired a controlling interest in, among other things, a company that shipped trucks to South America, another that shipped vegetables to Europe, a Panamanian company that owned a seagoing vessel, a purebred cattle ranch, and an Arabian horse ranch (May 18, 1979, Tr. of Hearing before Judge Aronovitz 37-46). While estimates of petitioner's net worth varied, it was clear that his progressive acquisition of these several properties could

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[2]After a hearing on May 10, 1979, following petitioner's deportation to the United States, a United States Magistrate for the Southern District of Florida initially fixed bail at $2,000,000. Thereafter, upon rehearing on May 18, 1979, he reduced the amount to $500,000. After a third hearing later that day, United States District Judge Aronovitz reinstated bail at $2,000,000. At petitioner's arraignment on July 12, 1979, in the Middle District of Georgia, before the judge who was later to preside over the trial, bail was continued in that amount. The transcripts of the Florida bail hearings were available to the trial judge at the arraignment (July 12, 1979, Tr. 6-7). On November 22, 1979, the trial judge reduced bail to $500,000. Petitioner met this requirement and was released.

not be attributed to his earnings from them. The court concluded that petitioner's wealth came from extensive trafficking in drugs, and that there was nothing "which indicates he would do anything other than continue that same enterprise" if released pending appeal (Pet. App. 1a). The court noted that in order to maintain his enterprises and his high standard of living, which included a $1,000 a month apartment, petitioner "would have to trade and traffic in drugs just like the evidence shows he was doing" (*id.* at 1a-2a). Accordingly, it concluded that petitioner "if permitted to stay out on bail would pose a danger to the community, the community being the whole United States" (*id.* at 2a).

Petitioner then filed a motion for bail pending appeal in the court of appeals. The court reviewed the record below and additional evidence supplied by petitioner (Pet. App. 4a n.1) and upheld the conclusion of the trial judge that "the risk of continued drug activity by [petitioner is] so high that he is a danger to the community" (*id.* at 5a).

ARGUMENT

Petitioner contends (Pet. 11-17) that the circumstances of this case do not justify the denial of bail pending appeal on the ground that petitioner is a "danger to the community" within the meaning of 18 U.S.C. 3148. This contention is without merit.

1. First, petitioner contends (Pet. 14-15) that "danger to the community" may be found only where there is a threat of violence. Therefore, he argues, the district court's findings concerning the likelihood that petitioner would continue to engage in drug trafficking if released on bail do not provide a basis for denial of bail pending appeal. The courts are generally agreed, however, that the statute protects the community against more than just physical harm (see, *e.g.*, *United States* v. *Provenzano*, 605

F. 2d 85, 95 (3d Cir. 1979), and it is well-settled that the sale of narcotics may constitute a danger to the community within the meaning of Section 3148. See *Hansford* v. *United States*, 353 F. 2d 858, 860 (D.C. Cir. 1965); *United States* v. *Wilson*, 257 F. 2d 796, 797 (2d Cir. 1958) (Clark, Circuit Judge), cited with approval in *Carbo* v. *United States*, 82 S. Ct. 662, 666 (1962) (Douglas, Circuit Justice); *United States* v. *Miranda*, 442 F. Supp. 786, 792-795 (S.D. Fla. 1977), rev'd on other grounds, 593 F. 2d 590 (5th Cir. 1979); *United States* v. *Nelson*, 346 F. Supp. 926, 927 (S.D. Fla. 1972), aff'd, 467 F. 2d 944 (5th Cir. 1972), cert. denied, 410 U.S. 956 (1973); *United States* v. *Erwing*, 268 F. Supp. 877 (N.D. Cal. 1967). Indeed, petitioner cites no authority holding that participation in a major narcotics conspiracy does not pose a danger to the community for the purposes of evaluating the appropriateness of a convicted defendant's release on bail. This danger is particularly severe where, as here, it is expected that the defendant will engage in narcotics distribution on a large scale.[3]

2. Petitioner also contends (Pet. 15-17) that the circumstances of this case do not demonstrate with adequate certainty the likelihood that petitioner would pose a danger if released on bail. We note that, contrary to petitioner's assertion (Pet. 16), the rulings of the court below did not rest on a mere "possibility" that petitioner would continue to traffic in drugs. The district court explicitly stated that "[m]y best judgment is * * * he would have to continue to trade and traffic in drugs" (Pet. App. 1a). Although the court of appeals did use the word "possibility" in its initial description of the trial court's

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[3]In this case, petitioner was convicted of conspiring to import huge quantities of drugs, including over 233 pounds of cocaine (Indictment, at 5).

decision (*id.* at 4a), its more detailed description of the trial court's holding (*id.* at 5a) was that the "risk of continued drug activity by [petitioner] was so high that he is a danger to the community". It was with this conclusion that the court of appeals expressed its independent agreement. Petitioner therefore was judged in both courts by the very standard for which he contends (Pet. 16), namely, a "high" degree of probability.

There is similarly no merit in petitioner's factual assertion (Pet. 17) that the circumstances of this case provide no justification for his incarceration. The record before the trial court in this case fully supports its finding that there is a substantial probability that petitioner will continue to traffic in drugs if he is released.[4] After a series of hearings, it was established that petitioner maintains an extraordinarily high standard of living, including a $1,000 per month apartment, maintenance of a cattle ranch and frequent travel by private plane (Pet. App. 4a). The court further found that there was "not one shred of evidence even presented to this court that shows a legitimate source" for his money (*id.* at 1a). Although petitioner did assert that he derived income from certain business enterprises, the record supports the court's skepticism of this explanation. For example, petitioner testified that he drew $7,000 per month salary from a corporation that grossed only $80,000-100,000 per year (May 18, 1979 Tr. of Bail Hearing before Judge Aronovitz at 38-39). The courts below thus had strong reason to believe that

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[4]Under Fed. R. App. P. 9(c), after he has been convicted, the burden is on the defendant to demonstrate that his release on bail will not pose a danger to the community.

petitioner would continue to engage in drug trafficking if released.[5]

Moreover, although a reviewing court must make its own independent determination, members of this Court have made clear that "great deference" is to be accorded to the bail decisions of lower courts. See, *e.g.*, *Truong Dinh Hung* v. *United States*, 439 U.S. 1326 (1978) (Brennan, Circuit Judge); *Mecom* v. *United States*, 434 U.S. 1340 (1977) (Powell, Circuit Justice); *Harris* v. *United States*, 404 U.S. 1232 (1971) (Douglas, Circuit Justice). Because the trial court has had face-to-face contact with the defendant, his associates and the witnesses, it is in the best position to judge the effectiveness within its district of possible release conditions. See *United States* v. *Provenzano*, *supra*, 605 F. 2d at 91-92. The trial court's determination here that no conditions of release could prevent petitioner from posing a danger to the community, affirmed by the court of appeals, was correct, and further review is unwarranted. The correctness of the decision of the lower courts evaluating the record in this case is not an appropriate subject for redetermination by this Court.

3. Petitioner's final contention (Pet. 18), that the court of appeals must convene an evidentiary hearing before it may endorse a district court's decision denying bail, is without merit. We are aware of no decision that has required such a hearing. Proceedings for bail in the court

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[5]We note that the trial court's decision in petitioner's case was not based on any blanket conclusion that persons engaged in narcotics trafficking are dangerous, or even that those engaged in this particular scheme should not be released on bail. Although six co-defendants have appealed their conviction, only petitioner is a party to this petition (Pet. I n.*). Four of the other co-defendants were released on bail pending appeal, and one was denied bail because the trial court found that he had no reasonable basis for appeal.

of appeals, pursuant to Rule 9(b), Fed. R. App. P., are quasi-appellate and are determined upon papers presented to the court of appeals and upon the record below.[6] In this case, petitioner had the benefit of several hearings on his suitability for bail, and also submitted additional evidence to the court of appeals (Pet. App. 4a n.1). Clearly, he was deprived of no constitutional right.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1980

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[6]After conviction, a defendant is no longer clothed in the presumption of innocence and has no absolute right to bail. Rather, "courts are empowered to elect to detain defendants in such cases" under the circumstances and using the procedures specified by Congress. H.R. Rep. No. 1541, 89th Cong., 2d Sess. 15 (1966).

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